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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 862.

PENNSYLVANIA WATER & POWER COMPANY,
A CORPORATION,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF FOR PENNSYLVANIA WATER & POWER COMPANY, PETITIONER.

WALTER C. CLEPHANE,
CHARLES MARKELL,
GEORGE T. HAMBRIGHT,
ARTHUR H. CLEPHANE,
Counsel for Petitioner.

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This reply will be limited to (1) a new departure in respondent's brief and (2) mention of certain issues (presented by the petition) ignored by respondent. Reply will be made under the same captions as in petitioner's original brief, with page references to corresponding portions of the petition and the respective briefs. The petition and petitioner's brief will be referred to thus: [P. 1-40]; respondent's brief thus: [R. B. 1-12].

I.

A.

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED, BY ANY STATUTE, TO *ORDER* ANYBODY TO ACCEPT—OR APPLY FOR—A LICENSE. [P. 27-28, 2-4, 17, 20; R. B. 11]

The Commission at last recognizes that its peremptory order that petitioner "shall within 30 days * * * file * * * an application * * * for a license * * * to operate and maintain the Holtwood project" [R. 215] is beyond its authority. The Commission now says this order means that petitioner shall *cease* operating and maintaining the dam *unless* petitioner applies for a license—but intimates that petitioner might be *prevented* by the Commission from *obeying* this order by removing the dam [R. B. 11].

This self-contradictory afterthought is contrary to the terms of the order and to the Commission's findings. The Commission found that "there is nothing in the record * * * which would support a conclusion" that an order requiring the project to be removed "would be expedient and in the public interest". The Commission *therefore* concluded "that an appropriate order * * * is an order requiring" petitioner "to apply for a * * * license" [P. 4; R. 207]. In the application for rehearing [R. 217] and in the petition for review [R. 20] petitioner denied the Commission's authority to order petitioner to apply for a license. The Commission now, for the first time, asks (in effect) that the order be rewritten contrary to the Commission's findings and the evidence.

I.

B.

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED BY THE ACT OF 1935, BY SECTION 4(g), TO *ORDER* MAINTENANCE AND OPERATION OF A DAM STOPPED, FOR THE SOLE PURPOSE OF EXACTING RANSOM FOR *NOT* STOPPING IT. [P. 28-30, 17, 20-21; R. B. 10]

The Commission sets up and knocks down a man of straw, citing the *Appalachian* case [R. B. 10]. It simply ignores (1) the difference between (*a*) exercising the power (however broad) to "abate obstructions in the interests of commerce" and (*b*) exacting ransom for *not* exercising the power and (2) the decisions of this Court, *not* impaired on this point by the *Appalachian* case [P. 28-29].

II.

A.

THE ACT OF 1935, BY AMENDING SECTION 23 OF THE FEDERAL POWER ACT, DOES *NOT* MAKE UNLAWFUL THE CONTINUED OPERATION AND MAINTENANCE OF A LAWFULLY CONSTRUCTED DAM OPERATED EVER SINCE 1910. [P. 32-33, 18, 21; R. B. 8-9]

The lower Court construes section 23(b) as "retroactive", applicable to continued maintenance of lawfully constructed dams [R. 2320-2321; 123 F. 2d 163]. The Commission asserts that this is "plainly" *not* a retroactive construction, citing cases wholly unrelated on the facts [R. B. 8-9], ignoring on this point the *Appalachian* case [P. 20].

The Commission dogmatically insists that the word "maintain" has this effect [R. B. 8]. It ignores the natural *prospective* construction of "construct, operate or maintain" [P. 32], the saving clause [Section 23(a)],

which is broader than the prohibition [section 23(b)] [P. 33], the rule against retroactive construction, the reasons for the rule, and all other evidence of Congressional intent.

II.

A. [*supra*, 3]

B.

THE SUSQUEHANNA IS *NOT* A NAVIGABLE WATER OF THE UNITED STATES *WITHIN THE MEANING OF THE RIVERS AND HARBORS ACT OF 1899.* [P. 33-36, 18].

C.

PETITIONER'S DAM IS *NOT* UNLAWFULLY OPERATED AND MAINTAINED. [P. 36-37, 18; R. B. 9. On this point (R. B. 9) the Commission confuses (*a*) the *fact* of Congressional consent (express or implied) to an obstruction and (*b*) *revocation* of such consent in the exercise of the power to "abate obstructions"—*not* to exact ransom for *not* abating them.]

D.

CONGRESS DID *NOT*, BY THE ACT OF 1935, AUTHORIZE THE COMMISSION TO *RETROACTIVELY OVERRULE* SECRETARY TAFT'S AND MR. FRANKFURTER'S ADMINISTRATIVE CONSTRUCTION OF THE ACT OF 1899, *AS APPLIED TO THE SUSQUEHANNA RIVER*, SO AS TO OUTLAW A DAM BUILT ON THE FAITH OF THAT CONSTRUCTION AND MAINTAINED WITHOUT GOVERNMENTAL OBJECTION FOR 25 YEARS. [P. 38-40, 19, 22-23]

On all these questions as to the construction and application of the Acts of 1899, 1920 and 1935, the Commission completely ignores the unusually full and clear history of practical administrative construction—by the executive, legislative and judicial branches of the Government. In the *Appalachian* case this Court holds that the application of such statutes to particular waters in-

volves "questions of law inseparable from the particular facts to which they are applied" and that each application of the legal test "is apt to uncover variations and refinements which require further elaboration" [311 U. S. 404, 406]. This circumstance makes practical disposition of such mixed questions of law and fact peculiarly appropriate. Nevertheless the administrative construction and application by the Commission's predecessors, SECRETARY TAFT and MR. FRANKFURTER [P. 10-14, 38], the reports to Congress specifically discussing petitioner's dam [P. 15-16, 38-39], the Commission's explanation to Congress of the amendments, "all minor", requested and obtained in 1935 [P. 27, 39], and its counsel's statement to Congress as to the legal status of petitioner's dam at that time [P. 16-17]—have all been ignored by the Commission.

Usually commissions and other Governmental agencies emphasize—and overemphasize—alleged practical administrative construction and application of statutes. At this moment the Commission is preparing to ask this Court to review the decision of the Circuit Court of Appeals for the Third Circuit, as to the construction and application of Section 20 of the Federal Power Act, in *Safe Harbor Water Power Corporation v. Federal Power Commission,* 3 Cir., 124 F. 2d.....*,* decided December 2, 1941, [P. 22-23. *Cf. Safe Harbor Water Power Corporation v. United States,* 313 U. S. 546]. In that case the Commission unsuccessfully urged extreme contentions as to alleged administrative construction of the Act of 1920 and effect of the Act of 1935 on the construction of *unchanged* provisions of the Act of 1920. The Commission has announced to the Circuit Court of Appeals its intention to apply for the writ of certiorari, and has obtained two

successive stays of the mandate. The second stay will expire on February 23, 1942; the statutory period for application for certiorari will expire on March 2, 1942.

In order that the Commission's (and its opponents') various contentions as to the practical construction and application of the Federal Power Act and the interrelation between the Acts of 1920 and 1935 may all be before this Court at the same time, petitioner respectfully suggests that action on this petition for certiorari be deferred until consideration of the Commission's application about to be made in the *Safe Harbor* case.

Respectfully submitted,

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